IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 9TH JANUARY 2007 / 19TH PAUSHA 1928

WP(C).No. 2390 of 2005(H)

OS.316/1997 of MUNSIFF COURT, PALA
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PETITIONER:

JOY MICHAEL, THALACHIRA HOUSE,
ANTHINADU KARA, LALAM VILLAGE.

BY ADV. SRI.V.GIRI
SRI.SUNIL CYRIAC

RESPONDENTS:
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1. K.T. JOSEPH, KANDAPARAMBIL HOUSE FROM
THALACHIRA HOUSE, ANTHINADU KARA, LALAM VILLAGE.

2. RAJESH JOSEPH, S/O. JOSEPH,
KANDAPARAMBIL HOUSE FROM THALACHIRA HOUSE,
ANTHINADU KARA, LALAM VILLAGE.

BY ADV. SRI.P.C.HARIDAS
SRI.S.V.BALAKRISHNA IYER
SRI.K.JAYAKUMAR
SRI.P.B.KRISHNAN
SRI.R.SURAJ KUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 09/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

Ext.P1:- Photostat copy of plaint in OS 316/97 before the Munsiff Court, Pala.

Ext.P2:- True copy of IA No.1059/2000 filed on 20.5.2000 in OS 316/97 along with supporting affidavit.

Ext.P3:- True copy of affidavit filed in support of IA 1282/2000.

Ext.P4:- True copy of judgment dt. 30.6.2004 in AS 51/2000 of the Sub Court, Pala.

Ext.P5:- True copy of application IA 38/2005 dated 4.1.2005 filed before the Munsiff Court, Pala.

Ext.P6:- True copy of application IA 37/2005 dated 4.1.2005 filed before the Munsiff Court, Pala.

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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W.P.(C) NO.2390 OF 2005

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Dated this the 9th day of January 2007

JUDGMENT

Petitioner is plaintiff and respondents defendants in O.S.316/97 on the file of Munsiff Court, Pala. Suit was filed seeking a decree for permanent prohibitory injunction preventing respondents from causing any obstruction to the pathway described in the plaint. Petitioner claimed that he has a right of easement by prescription over the plaint schedule property. After the filing of the suit, plaint was amended twice. Again petitioner filed another application for amendment to incorporate further allegations in the pleading. It was dismissed by the trial court. After trial, learned Munsiff dismissed the suit. Petitioner challenged that decree and judgment before Sub Court, Pala in A.S.51/00. Learned Sub Judge on hearing the appeal, found that learned Munsiff should have allowed the amendment sought

for by the plaintiff and therefore allowed the amendment application on payment of cost. Consequently the decree and judgment were set aside and suit was remanded back to the trial court for fresh disposal. After remand, suit records were received by the learned Munsiff on 15.12.04. Case was posted for steps and thereafter it was included in the special list on 7.1.05. On 5.1.05 petitioner filed I.A. 37/05 an application for appointment of a Commission and I.A.38/05 an application to amend the plaint under Order VI Rule 17 of CPC. Respondents objected to the petitions contending that petitioner is only trying to protract the trial and there is no bona fides in the petition and the amendment cannot be allowed and the Commissioner cannot be appointed. Under Ext.P9 order, learned Munsiff dismissed both the applications. It is challenged in this petition filed under Article 227 of Constitution of India.

2. Learned counsel appearing for petitioner and respondents were heard.

3. On hearing the arguments and going through Ext.P9 order and Ext.P4 judgment in the appeal and the amendment applications filed, it is clear that learned Munsiff dismissed the applications on the ground of delay, without considering the crucial question whether for a just decision of the case amendment sought for is to be allowed or not. True, there is laches and negligence on the side of the petitioner to take out a Commission and to file the application for amendment. But the circumstances of the case reveal that it was not the fault of the petitioner but major part of the fault was the counsel who appeared for petitioner and framed the suit. That is why amendments were necessitated in the plaint.

4. The suit itself was filed for a permanent prohibitory injunction claiming a right of way, by easement of prescription. What was sought for by the present amendment application was to show the property of the petitioner as 'A' schedule property which is the dominant tenement and plaint 'B'

schedule belonging to the respondent, the servient tenement and the plaint 'C' schedule pathway which passes through the plaint B schedule property. For a proper disposal of the disputes, it is necessary that the properties are properly described. Similarly when a right of easement by prescription is sought to be established, it is necessary that actual lie of the pathway is fixed, before considering the question whether plaintiff has a right of easement by prescription over that way. As no Commission was taken, learned Munsiff should have permitted petitioner to take out a Commission. So also permission to amend the plaint as sought for should have been allowed without rejecting it on the ground of delay. The other amendment sought for is on the details of the right of easement claimed. The amendment, if allowed will not alter the nature and character of the suit. For a proper and just decision of the case and in the interest of substantial justice, learned Munsiff should have allowed both the

applications. Though there is a delay, that could be compensated by cost.

Writ Petition is allowed. Ext.P9 order is quashed. I.A.37/05 & 38/05 will stand allowed on the petitioner paying a cost of Rs.1500/- to the counsel appearing for respondents within two weeks. If the cost is not paid as directed and memo is not filed before the trial court, Ext.P9 order will stand. Learned Munsiff shall see that the suit is disposed as expeditiously as possible and in any event within six months from the date of receipt of a copy of this judgment.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006